No. 95-587

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Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC. AND COLORADO PROFESSIONAL EDUCATION, INC. d/b/a COLORADO BAR REFRESHER, INC.,

Petitioners,

v.

MULTISTATE LEGAL STUDIES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

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November 13, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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27 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied the two-product test established in *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984), and *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992), to the unique facts of this case.

2. Whether product improvement as a business justification was properly left open for trial when petitioners did not assert product improvement as an affirmative defense on summary judgment and the product improvement issue would better be resolved on a full record.

3. Whether the court of appeals correctly determined that petitioners were not entitled to summary judgment on the predatory pricing claim against them where they admittedly priced one of their products below any measure of cost.

4. Whether review is appropriate to determine the scope of the duty to cooperate with a competitor in an attempt to monopolize case where the court below did not, and did not need to, resolve that issue.

RULE 29.6 LIST

Respondent Multistate Legal Studies, Inc. has no parent corporation and no subsidiaries.

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STATUTES
The Sherman Act, 15 U.S.C. §§ 1, 2 6

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BRIEF IN OPPOSITION

Multistate Legal Studies, Inc. (referred to by its trade name "PMBR") hereby opposes the petition for a writ of certiorari filed by Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("HBJL") and Colorado Professional Education, Inc. d/b/a Colorado Bar Refresher, Inc. ("CBR") (collectively "petitioners").

STATEMENT OF THE CASE

Petitioners are monopolists in the market for full service bar review courses in the State of Colorado. This antitrust case involves their efforts to extend that monopoly to the separate market for supplemental bar review courses. Because petitioners have ignored the evidence which led the court of appeals to conclude properly that

summary judgment in their favor was inappropriate, a brief counter-statement of the case is necessary.

1. As the parties stipulated in the district court, there are two separate product markets related to lawyers' preparation for the Colorado bar exam. C.A. App. 240-43.[1] The first consists of full service bar review courses. These are six to seven week courses designed to prepare students for all four components of the Colorado bar exam: the Multistate Bar Exam ("MBE"), the essay questions, the Performance Test, and the Multistate Professional Responsibility Evaluation. *Id.* at 173-75.

The second, separate market is for supplemental MBE workshops. These are intensive, three-day workshops that provide special preparation directed solely to the MBE portion of the Colorado bar exam. *Id.* Generally, the first day of a supplemental MBE workshop consists of the administration of a simulated MBE, and the other two days are spent reviewing the correct answers. Supplemental MBE workshops are designed to be taken *in addition* to a full service course by students who believe that the critical MBE portion of the bar exam requires special preparation. *Id.* at 354.

Petitioner HBJL is the largest provider of full service bar review courses in the country. Since 1974, HBJL and its licensee CBR have, as they stipulated below, jointly enjoyed a monoply in the Colorado market for full service bar review courses. *Id.* at 240-43; Pet. App. 5a.

In 1977, PMBR pioneered supplemental MBE workshops, which it began offering in Colorado in approximately 1978. C.A. App. 355, ¶ 5. By 1991, PMBR was the most successful supplemental MBE workshop provider in the country. *Id.*

In the early 1980's, petitioners began offering supplemental MBE workshops in Colorado. *Id.* From the out-

[1] Citations to C.A. App. refer to the Appellant's Appendix on appeal to the Tenth Circuit.

set, they marketed these workshops—which they eventually came to call "Gilbert's"—separately from their full service courses. *Id.* Students who wished to take petitioners' supplemental MBE workshop submitted a separate application and paid a separate fee from the full service course. *Id.*

The genesis of this case was PMBR's announcement in 1989 that it intended to offer a full service course in California and, if successful, in such other states as Colorado. CBR's president admitted that petitioners considered PMBR a potential competitor in the Colorado full service bar review market. *Id.* at 447-48; see also Pet. App. 5a. In response to PMBR's announced entry into the full service market, HBJL's chief executive officer, Richard Conviser, made a proposal to PMBR's president, Robert Feinberg, that the companies allocate markets between them. C.A. App. 359. Specifically, Conviser proposed that PMBR not offer full service courses outside California in return for HBJL not offering supplemental MBE courses anywhere. *Id.* Feinberg declined, citing antitrust concerns, which prompted Conviser to threaten "[y]ou'll be sorry." *Id.*[2]

Several months later, as reflected in the minutes of HBJL's annual meeting, Conviser told HBJL's executives that "this is the year to go after PMBR." *Id.* at 379. Petitioners then began taking a number of steps to drive PMBR out of business and to acquire PMBR's share of the supplemental MBE workshop market.

First, although they had *always* offered their full service course and their Gilbert's MBE workshop as separate products, HBJL and CBR began to bundle the two products. For the July 1992 bar exam, HBJL and CBR for

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[2] In *Palmer* v. *BRG, Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam), this Court held that the license agreement between HBJL and its Georgia licensee was " 'formed for the purpose and with the effect of raising' the price of the bar review course" and hence "was unlawful on its face."

the first time offered their full service course and Gilbert's workshop as a two-product package at $795, the price previously charged for the full service course alone. Not surprisingly, all of their full service customers automatically purchased the Gilbert's workshop as well. Petitioners permitted customers to purchase the Gilbert's workshop alone for its established price of $325, but did not permit customers to purchase the full service course without also receiving Gilbert's. Pet. App. 11a.

Second, in conjunction with this new two-product package offering, petitioners began an advertising campaign stating that their full service customers would receive the Gilbert's workshop "for free." C.A. App. 423. Their marketing encouraged students to avoid, or withdraw from, PMBR's supplemental MBE workshops. *Id.* at 364-65, ¶ 40; 351, ¶ 9; 534-35.[3]

Third, petitioners planned from the outset to bundle their full service and supplemental courses in Colorado only on a temporary basis. In September 1992, CBR's president wrote to an HBJL official and "referred to a future time when the Gilbert course would again be offered only for added tuition, as it was before the summer of 1992." Pet. App. 11a-12a; see also C.A. App. 199, 346. Consistent with this intention to unbundle the package offering, petitioners still employ separate national administrators, campus representatives, registration forms and addresses for the two courses. Pet. App. 12a. In addition, HBJL has in several states other than Colorado continued to offer full service and supplemental MBE courses as entirely distinct products. *Id.* at 11a; C.A. App. 325, ¶ 8.

Fourth, in addition to bundling, HBJL and CBR intentionally created schedule conflicts between their full serv-

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[3] In 1993, HBJL and CBR increased the price of thier full service course from $795 to $845 to recapture some of the added costs of providing Gilbert's as part of the two product package. Pet. App. 11a. Nevertheless, petitioners continued to advertise that Gilbert's was being offered "for free." *Id.* at 32a.

ice courses and PMBR's supplemental MBE workshops, despite having taken "extraordinary steps" to avoid such conflicts in the past. *Id.* at 205, 446. PMBR was informed that such scheduling conflicts would persist until it agreed not to enter into the Colorado full service market. *Id.* at 421, 459-74. As a result, scheduling conflicts became common, not only in Colorado, but nationwide as well. Across the country there was a 900 percent increase in conflicts from 1990 to 1992. *Id.* at 370-71, ¶ 60.

Petitioners' campaign of predation has largely achieved its intended effect.[4] PMBR's share of the Colorado supplemental MBE market declined from 84 percent in 1991 to 22 percent in 1993. Pet. App. 6a. Likewise, enrollments of the other MBE workshop provider in Colorado, APTS, declined by more than 50 percent from 1991 until 1993. C.A. App. 338-39. A potential new supplier of MBE workshops, Reed Law Group, cancelled its 1993 Colorado workshops. *Id.* at 361, ¶ 31.

On the other hand, petitioners' share of the supplemental MBE workshop market grew from 11 percent in 1991 to 76 percent in 1993. Pet. App. 6a. And, due to its losses, PMBR was forced to scrap its plan to expand into the Colorado full service market. *Id.* at 5a. Thus, petitioners' monopoly in the full service market has been preserved.

2. PMBR commenced this action on November 25, 1992. In its complaint, PMBR alleged that since 1992 petitioners have violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by tying the sale of their Gilbert's supplemental workshops in Colorado to their full service courses and by pricing the Gilbert's portion of the two-product package at a predatorially low price. PMBR further alleged that petitioners have attempted and conspired to

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[4] HBJL's chief operating officer has stated that the purpose of packaging the two products together was to "get back" at PMBR. C.A. App. 581, ¶ 2.

monopolize the supplemental MBE market through a series of predatory actions in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. In addition to tying and predatory pricing, these actions include intentionally scheduling their full service courses so that students could not also take PMBR's courses. C.A. App. 11-26.

Following discovery, petitioners moved for summary judgment. Their principal contention was that they had not combined two separate products, but rather had simply improved their full service course offering. From that premise, they argued that they had not engaged in tying, predatory pricing, or any other antitrust violation. *Id.* at 98-139.

The district court granted petitioners summary judgment as to all of PMBR's federal antitrust claims. It ruled that PMBR had not proved an essential element of its claims because, in its view, incorporating a supplemental MBE workshop into a full service course is an "improvement" of the full service course, not the tying together of two separate products. Pet. App. 50a. In its view, the one-product finding was fatal not only to the tying claim, but to PMBR's other claims as well.

3. On appeal, the Tenth Circuit affirmed in-part, reversed in-part, and remanded for trial. Initially, it concluded that the district court had erroneously failed to apply the test established by *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984), and *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992), for determining whether a package sale involves two separate products or a single product with multiple components. Pet. App. 13a-14a. Those cases teach that distinct products exist for purposes of tying where there is " 'sufficient consumer demand so that it is efficient for a firm to provide [one] separate from [the other].' " *Id.* at 14a (quoting *Kodak*, 504 U.S. at 462; *Hyde*, 466 U.S. at 21-22). Applying that test to the

evidence before it, the Tenth Circuit concluded that PMBR had presented sufficient evidence—including evidence that petitioners had sold the two products separately in the past and continued to do so in certain markets—to create a factual dispute as to whether defendants combined two products, or simply improved a single product. *Id.* at 16a.

The court of appeals thus overturned the grant of summary judgment on the tying claim for 1993 to the present, the years in which petitioners forced its full service customers to purchase Gilbert's. *Id.* at 18a. It also overturned summary judgment on the predatory pricing claim for 1992, the year petitioners included Gilbert's in the package for no extra charge, finding that respondent had presented sufficient evidence that petitioners had a "reasonable expectation" of recouping their losses from predatory pricing. *Id.* at 18a-21a.

The court of appeals also reversed summary judgment on respondent's claims that petitioners had attempted and conspired to monopolize the supplemental MBE workshop market, concluding that respondent's evidence concerning tying, predatory pricing, and the creation of intentional schedule conflicts was sufficient to allow a jury to find anticompetitive conduct. *Id.* at 22a-23a, 32a. In this connection, the court of appeals further concluded that the evidence on petitioners' product improvement and other defenses was disputed. The court of appeals reasoned that the evidence showing petitioners' dramatic increase in market share, their superior resources, and the high barriers to entry into the supplemental MBE workshop market was sufficient to preclude summary judgment on the "dangerous probability of success" element. *Id.* at 33a-39a.[5]

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[5] Finally, the court of appeals upheld the district court's grant of summary judgment as to respondent's claim that petitioners monopolized and conspired to monopolize the full service bar review market. This ruling is not challenged before this Court.

REASONS FOR DENYING THE PETITION

Contrary to petitioners' contentions, the Tenth Circuit's decision is not erroneous, does not create a conflict among the circuits, and does not deviate from this Court's earlier decisions. Instead, the court of appeals simply applied this Court's teachings to the evidence presented by the parties and determined that there were disputed facts which precluded the award of summary judgment. This case does not present important or novel legal issues, only factual disputes not calling for this Court's review.

I. THE RULING HERE FAITHFULLY APPLIES THE *HYDE/KODAK* TWO-PRODUCT TEST AND DOES NOT CONFLICT WITH RULINGS FROM ANY OTHER CIRCUIT.

Petitioners argue that the Tenth Circuit's decision "misconstrues" the *Hyde/Kodak* test for determining whether, in a tying case, a package sale involves two separate products or a single product with multiple components, and that it conflicts with rulings from other circuits. Pet. 10-15. In actuality, the Tenth Circuit's decision faithfully applies *Hyde/Kodak* and conflicts with no appellate decision applying that test.

A. The Tenth Circuit Correctly Applied *Hyde/Kodak*.

In *Hyde*, this Court explained "that the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." *Hyde*, 466 U.S. at 19. A finding of separate products is appropriate whenever there is sufficient consumer demand that "it is efficient to offer" the two products separately. *Id.* at 21-22. Thus, hospital services and anesthesiological services are two separate products where the hospital had historically billed the two services separately and where patients "often" requested specific anesthesiologists. *Id.* at 22.

In *Kodak*, this Court, reversing the entry of summary judgment, held that there was sufficient evidence from which a jury could find that service and parts were separate products, explaining, "[f]or service and parts to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide service separately from parts." *Kodak*, 504 U.S. at 462 (citation omitted). The record there contained sufficient evidence of such demand because "service and parts have been sold separately in the past and still are sold separately to [certain] owners."

Here, the court of appeals carefully reviewed the record to determine whether a jury reasonably could find there was sufficient separate demand for petitioners to offer their full service and supplemental MBE courses as separate products. Its opinion identifies several sources of evidence from which a jury reasonably could conclude that separate demand exists under the governing *Hyde/Kodak* test, including evidence that:

> 1) Defendants stipulated that full-service courses and supplemental MBE workshops are in separate product markets.
>
> 2) Defendants have marketed their full-service course and their supplemental workshop as separate products, for separate fees, for over a decade and still offer Gilbert separately.
>
> 3) In Kansas, Ohio and Hawaii, HBJL and/or its licensees still offer the full-service course unbundled from Gilbert.
>
> 4) Prior to Defendants' bundling, not every full-service course customer chose to purchase a supplemental workshop; in Colorado, only one-third to one-half did so.
>
> 5) In the past, HBJL officials worked to keep their external Gilbert workshop separate and distinct in customers' minds from the HarBrace workshop within the full-service course, because many cus-

tomers preferred to buy from two different companies to get multiple providers' perspectives on the MBE.

6) Defendants have not consolidated the operation of the full-service and supplemental courses; Gilbert continues to be administered and marketed separately.

7) One or more of Defendants' officers contemplated that the inclusion of the Gilbert workshop in the full-service course at no added charge would be only temporary.

8) Other bar review industry participants view full-service and supplemental MBE courses as separate products.

Pet. App. 15a-16a.

Thus, as in *Kodak*, summary judgment on the two product issue was plainly inappropriate. The two products have been sold separately in the past and still are sold separately to "[certain] owners." The evidence upon which petitioners rely—that their full service course always has had *some* MBE preparation, the parties' stipulation reflecting that fact,[6] and petitioners' view that they simply increased the MBE content of their full service course—at most creates a factual dispute which must be resolved by a jury under the *Hyde/Kodak* test. Moreover, *Kodak* directly refutes the petitioners' contention that there can be only one product because the parties stipulated that a full service course includes MBE preparation. *Kodak* quoted with approval the Court's statement from *Hyde* that "[w]e have often found arrangements

[6] The full text of the relevant stipulations is as follows: "[a] full-service bar review course is designed to prepare students for all components of that jurisdiction's bar examination"; "CBR offers a full-service bar review course in the State of Colorado consisting of a six-week curriculum that prepares students for the Colorado bar examination, including the essay portion of the exam, the MBE, the PT and the MPRE." C.A. App. 174-75, ¶¶ IV.C.1, IV.F.2.

involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." 504 U.S. at 463.

Petitioners assert that review should be granted because the *Hyde/Kodak* test does not apply to "a composite product that *necessarily* includes a component also sold separately." Pet. 11. There are at least two reasons why they are wrong.

First, petitioners' argument assumes its conclusion. That this case involves such a composite product is not "necessarily" so, but is only petitioners' contention, based on their evidence alone. While petitioners contend this case is akin to viewing the butter in cookies as a separate product from the cookies, the facts supporting that characterization are hotly disputed. PMBR's evidence, which petitioners persistently ignore, supports the competing characterization that this case is like a monopolist cookie maker requiring its cookie customers also to purchase a five pound tub of butter, or a monopolist car maker requiring its customers to purchase a car with four tires *plus* twelve spares. In light of the disputed facts, the Tenth Circuit correctly recognized this issue must be resolved by a jury.

Hyde and *Kodak*, moreover, make plain that the separate demand test applies universally to all tying cases. In *Hyde,* anesthesiology and other hospital services were found to be separate products, even though anesthesiology is a necessary component of surgery. And *Kodak* expressly rejected an argument that "parts and service [of photocopiers] are not separate products for tying purposes because all service may involve installation of parts." 504 U.S. at 463 n.7. The *Kodak* Court explained:

> that there can never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires . . . is an assumption we are unwilling to make.

Id. at 463. Whether such separate markets exist in a particular case, *Kodak* emphasized, is a factual question that cannot be resolved on summary judgment where, as here, the relevant facts are disputed. *Id.* at 463 n.7.

B. The Decision Here Does Not Create A Circuit Conflict.

Petitioners' subsidiary contention that the Tenth Circuit's decision "conflicts with a majority of the circuits" is without substance. They cite three cases decided after *Hyde* but before *Kodak*. Pet. 10 (citing *Jack Walters & Sons Corp.* v. *Morton Bldg., Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984); *Montgomery County Ass'n of Realtors, Inc.* v. *Realty Photo Master Corp.*, 1993-1 Trade Cas. (CCH) ¶ 70,239 (4th Cir.) (unpublished), *cert. denied*, 114 S. Ct. 440 (1993); *Souza* v. *Estate of Bishop*, 821 F.2d 1332 (9th Cir. 1987)). But none of these cases conflicts with the present one.

Petitioners stress *Jack Walters* most vigorously, but the only question presented there was whether a physical product and its associated trademark are separate products. 737 F.2d at 704-05. Applying the *Hyde* separate-markets test to the undisputed record before it, the court, through Judge Posner, unremarkably concluded that there were not separate products. *Id.* at 704 ("the separate-markets test of [*Hyde*] is not satisfied"). The panel also emphasized that the multiple product question cannot be "decided on summary judgment . . . if there is any material fact in dispute." *Id.* at 705.

The portion of the *Jack Walters* opinion on which petitioners rely here was, as Judge Posner acknowledged, *dicta*.[7] Before deciding the narrow question before the court, the panel questioned the economic wisdom of the

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[7] *Jack Walters*, 737 F.2d at 704. Judge Swygert wrote a separate concurrence criticizing the majority for writing such extensive *dicta*. *Id.* at 713-14.

Hyde separate-markets test. In particular, the panel expressed concern that, under *Hyde*, sales of belts could be viewed as tie-ins of buckles and straps, or sugary cereal as tie-ins of sugar and cereal. *Id.* at 704. The panel majority viewed these results as "problematic." *Id.*

The *dicta* from *Jack Walters* constitutes no more than a scholarly criticism of the Hyde separate-markets test, not a conflict with the ruling here. In any event, any doubts as to the validity of the *Hyde* test were laid to rest when this Court revisited the separate product question in *Kodak*. Rather than retreating from the *Hyde* test, *Kodak* reaffirmed it, holding squarely that there are "two distinct products" if there is "sufficient consumer demand so that it is efficient for a firm to provide [them] separately . . . ." 504 U.S. at 462.

The unpublished opinion in *Montgomery County* likewise creates no conflict.[8] There, plaintiffs unsuccessfully sought to enjoin as a tie-in the sale of multiple list real estate information coupled with pictures of the properties. 1993-1 Trade Cas. (CCH) ¶ 70,239, at 70,179-80. Applying *Hyde* in a straightforward manner, the Fourth Circuit concluded there was not sufficient separate demand to make it efficient to sell the two items independently. See *id.* at 70,181 (whether two separate products exist " 'turns not on the functional relation between the two allegedly separate products, but rather on the character of the demand for the two items' ") (citing *Hyde*, 466 U.S. at 19).[9]

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[8] Of course, a conflict with an unpublished decision would not merit this Court's plenary review. As Fourth Circuit Rules 36.5 and 36.6 make clear, citations to unpublished decisions are "disfavored" because they "may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court."

[9] Likewise, the Ninth Circuit in *Souza* applied *Hyde* in straightforward fashion, holding that "the plaintiffs presented no evidence from which a reasonable juror could find that the house and lease constituted separate products." 821 F.2d at 1336.

In sum, the court of appeals' decision faithfully applied the governing *Hyde/Kodak* test, and creates no conflict among the circuits.

II. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR RESOLVING WHETHER THE BUSINESS JUSTIFICATION OF PRODUCT IMPROVEMENT SHOULD BE RECOGNIZED AS AN AFFIRMATIVE DEFENSE TO A SECTION 1 TYING CLAIM.

Petitioners argue that this Court should grant review to determine whether the business justification of product improvement should be recognized as an affirmative defense to a Section 1 tying claim. Pet. 16. It would be inappropriate, however, to consider that issue at this stage of this case. First, the issue is not in fact presented here. Second, consideration of this issue now would not, regardless of the outcome, eliminate the need to remand for trial. Third, trial could well make the Court's resolution of the issue unnecessary. Finally, the Tenth Circuit's decision creates no circuit conflict.

A. The Propriety Of A Product Improvement Affirmative Defense Was Neither Litigated Nor Resolved Below.

Petitioners now argue the product improvement issue in a fundamentally different way and for a fundamentally different purpose than they did below. Their position below was that they had not combined two separate products, but rather had simply improved a single product. Br. of Appellee 19.[10] From this premise (which the

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[10] In the pre-trial order, petitioners explained that their legal theory was as follows:

> "An essential ingredient of PMBR's tying and predatory pricing claims is that CBR is selling two products . . .
>
> The two product theory is incorrect. Full-service courses are a single product . . . . CBR's full-service course has included

Tenth Circuit correctly held was disputed), they argued that they had not engaged in tying at all.

Petitioners, in other words, argued product improvement to rebut an element of respondent's *per se* claim—the two product element—not, as they now suggest they did (Pet. 16), to prove an affirmative defense to *per se* liability. Petitioners failed to put into issue and prove such an affirmative defense. They did not identify the elements of any such affirmative defense, argue why such a defense should be recognized as to a *per se* Section 1 violation, cite any of the cases or authorities they now argue support the validity of such a defense (see Pet. 17-20), or demonstrate that there was no factual dispute as to any of the elements of their affirmative defense.

The Tenth Circuit likewise did not understand petitioners to argue they were entitled to summary judgment based on an affirmative defense. To the contrary, that court said petitioner's argument was "that their actions involved nothing more than the improvement of a single product, their full-service course." The court described in detail why the evidence as to whether there were one or two products was in dispute (Pet. App. 13a-16a), but did not discuss in detail whether, or under what circumstances, there might be a business justification defense to a Section 1 tying claim (Pet. App. 25a n.9).

Thus, the question whether product improvement should be recognized as an affirmative defense to a Section 1 tying claim (or whether the *per se* standard should be relaxed to permit this) was neither litigated in, nor re-

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substantial MBE preparation since the introduction of the MBE in 1972. All significant full-service courses today, including CBR, have improved their products by emphasizing MBE practice examinations in a workshop setting. PMBR cannot divide the full-service course into two separate products just to preserve market niche."

C.A. App. 165-66.

solved by, the court of appeals. Petitioners have thus waived their right to pursue that issue in this Court at this juncture of the case.

B. A Ruling At This Time Would Be Unnecessary.

Even if this issue were properly before the Court, there is ample reason why the Court should not review it at this time. Although no case has recognized a product improvement defense where the threshold requirements of *per se* liability have been established under Section 1, a product improvement defense to a Section 2 violation requires evidence that petitioners were motivated by a desire to improve their product and, in fact, acted on that desire. See Pet. App. 25a-26a.[11] In reviewing PMBR's Section 2 claims, the Tenth Circuit held, however, that there were legitimate factual disputes as to each of these issues that could be resolved only by a jury.

To illustrate, as to the motivation for the change, the Tenth Circuit noted that "PMBR has offered evidence that the bundling was a response to PMBR's refusal to take part in a proposed market allocation agreement, that Defendant's executives never have believed that bar applicants need Gilbert to pass the bar; [and] that Defendants intended the bundling to be only temporary." *Id.* at 27a (internal citations omitted).[12] And, as to the effect of the change, the court observed that bar applicants de-

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[11] The cases cited by petitioners which have recognized a "good will" business justification defense against tying under Section 1 also have required proof that the actual effect of the tie was pro-competitive, and that no lesser restrictions were available to the tying defendant. The facts as to those issues are disputed as well. *See* Part II.C., *infra*.

[12] Moreover, PMBR presented evidence that bundling was not a response to competition in the Colorado full service market, in that petitioners did not consider their only competitor in that market, SMH Bar Review, a serious threat. C.A. App. 203-04, 362, ¶ 34.

scribed "the 'free' Gilbert sessions as 'horrible,' 'a waste of time,' 'awful' and 'a joke,' " and that the pass rate of petitioners' students declined after they packaged the two products together. *Id.* at 28a-29a.

The Tenth Circuit also found that the record contains ample evidence that petitioners' tie has had an anti-competitive effect, consistent with their intent to "get back" at PMBR. Since the tie was initiated, PMBR's share of the supplemental MBE market has declined from 84 percent to 23 percent, while petitioners' share has increased from 11 percent to 76 percent. *Id.* at 6a. Other competitors in the supplemental MBE workshop market also have suffered losses since petitioners began their bundling. C.A. App. 338-39, 361, ¶ 31.

There is, therefore, no reason why the Court should consider the product improvement affirmative defense question at this time. Because the relevant material facts are disputed, it would be necessary to remand this case for trial even if the Court were to conclude that such a defense should be recognized in Section 1 cases. Moreover, petitioners may well be unable to convince the jury that their defense is meritorious, or may, to the contrary, convince the jury that they are entitled to judgment on some other point altogether. In either event, the Court's consideration of this issue at this stage would prove to have been unnecessary. In sum, the product improvement defense is a factual issue that requires resolution by a jury and is not ripe for consideration by the Court at this time.

Petitioners' related argument—that the Tenth Circuit's decision "effectively nullifies product improvement as a viable defense" to a Section 2 claim (Pet. 24)—is sheer hyperbole, without any analytical content. The Tenth Circuit simply held, correctly, that the relevant facts are disputed. See Pet. App. 25a-29a.

C. The Ruling Here Does Not Create A Circuit Conflict.

Contrary to petitioners' suggestion, the ruling here does not create a circuit conflict as to the availability of a business justification affirmative defense in Section 1 tying cases. Nor could it since that issue was neither litigated nor resolved below.

Petitioners nonetheless claim *Virtual Maintenance, Inc.* v. *Prime Computer, Inc.*, 957 F.2d 1318, 1323 (6th Cir)., *vacated*, 113 S. Ct. 314 (1992), conflicts with the decision here by recognizing a business justification affirmative defense. However, *Virtual Maintenance* was decided before *Kodak*, and was vacated and remanded by this Court for reconsideration in light of that decision. *Virtual Maintenance, Inc.* v. *Prime Computer, Inc.*, 113 S. Ct. 314 (1992). On remand, the Sixth Circuit applied the test for *per se* illegality originally enunciated in *Hyde* to conclude that a *per se* illegal tie-in had been established, even though, under the rule of reason, the defendant's conduct would not have been prohibited. *Virtual Maintenance, Inc.* v. *Prime Computer, Inc.*, 11 F.3d 660, 663-67 (6th Cir. 1993).

Petitioners also claim *Metrix Warehouse, Inc.* v. *Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1042 & n.17 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988), and *Mozart Co.* v. *Mercedes-Benz, Inc.*, 833 F.2d 1342, 1348 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988) conflict with the decision here. But again, both of those cases expressly acknowledged that the *per se* rule applies to tying arrangements where the threshold criteria have been met. *Metrix*, 828 F.2d at 1038 n.9; *Mozart*, 833 F.2d at 1345.

Moreover, those cases involved a very different issue than the one petitioners seek to litigate here. At issue in *Metrix* and *Mozart* was the "good will" defense, which the Court addressed many years ago in *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305-06 (1949):

> Tying agreements serve hardly any purpose beyond the suppression of competition. The justification most often advanced in their defense—the protection of the good will of the manufacturer of the tying device—fails in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough. If the manufacturer's brand of the tied product is in fact superior to that of competitors, the buyer will presumably choose it anyway. The *only* situation, indeed, in which the protection of good will may *necessitate* the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied.

Id. (emphasis added) (cited in *Metrix*, 828 F.2d at 1040 & n.12). Applying this standard, the Fourth Circuit in *Metrix*, and the Ninth Circuit in *Mozart*, upheld the determinations of two different juries, based upon different evidentiary facts, as to whether a "good will" defense had been established. *Metrix*, 828 F.2d at 1041-42; *Mozart*, 833 F.2d at 1348.

This case, unlike *Metrix* and *Mozart*, does not involve a "good will" defense. Petitioners did not assert such a defense in the courts below. They did not cite or rely upon *Metrix* or *Mozart*. And they did not show, as both *Metrix* and *Mozart* mandate, that the tie "was established for a legitimate purpose and [that] no less restrictive alternative is available." See *Mozart*, 833 F.2d at 1348. To the contrary, the record shows that the tie was established to "get back" at PMBR and that it impaired, not enhanced, petitioners' good will. C.A. App. 25a-29a. For each of these reasons, review is not appropriate as to this issue either.[13]

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[13] Although petitioners also cite *Grappone, Inc.* v. *Subaru*, 858 F.2d 792, 799 (1st Cir. 1988), and *Kenworth, Inc.* v. *Paccar Financial Corp.*, 735 F.2d 622, 624 (1st Cir. 1984) (Pet. 19-20), they quite properly refrain from arguing that either decision conflicts with the ruling here.

Finally, review is not required to consider whether the rule of *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447 (1993)—that a Section 2 attempted monopolization claim is actionable only when there is proof of dangerous probability of success—should be extended to require proof of dangerous probability of monopolization of the tied product market for Section 1 tying claims. Pet. 20. Consideration of that issue could not conceivably affect the outcome of this case. As the Tenth Circuit found, the record contained sufficient evidence that there was a "dangerous probability" that petitioners could monopolize the supplemental MBE workshop market, including evidence that they had increased their share of that market from 11 percent in 1991 to 76 percent in 1993 as a result of their tying, pricing and schedule conflicting practices. Pet. App. 6a, 39a-40a. This clearly creates a question of fact as to "dangerous probability."

III. THE TENTH CIRCUIT DID NOT EXPAND THE LAW OF PREDATORY PRICING.

HBJL and CBR assert that the Tenth Circuit's decision conflicts with *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993). Pet. 25-27. That assertion is demonstrably incorrect.

Petitioners complain that the Tenth Circuit overlooked the fact that the 1992 tuition exceeded the cost of the package. Pet. 26. But once again petitioners improperly assume resolution in their favor of the disputed two product issue. Respondent conceded below that there was no predatory pricing if petitioners simply improved a single product. But the converse is also true. There would be a violation if, as respondent contends, petitioners tied two separate products together, a proposition which petitioners ignored below, but did not dispute. Pet. App. 20a n.7. Because the two product issue is legitimately disputed, and because petitioners charged nothing for Gilbert's in 1992,

the Tenth Circuit correctly held they were not entitled to summary judgment on this issue.

Petitioners also argue the Tenth Circuit ignored this Court's admonition in *Brooke Group* that "predatory pricing schemes are rarely tried, and even more rarely successful." Pet. 26. What petitioners ignore is the evidence presented by PMBR, and discussed by the Tenth Circuit, that the predatory pricing scheme here made sense "in order to discipline PMBR for refusing to allocate markets and to deprive PMBR of the resources necessary to continue its full-service market incursions." Pet. App. 19a n.6. Moreover, as evidenced by petitioners' 76 percent market share in the supplemental MBE workshop (*id.* 6a) their predatory scheme enabled them to expand their monopoly in the full service market to encompass the supplemental MBE workshop market as well, the precise result condemned by *Brooke Group*.

IV. THIS CASE DOES NOT INVOLVE AN *ASPEN SKIING* ISSUE.

Petitioners' final argument is that the Tenth Circuit improperly imposed potential liability on them "for refusal to cooperate with a rival," contrary to *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Pet. 27. This is a flat misstatement of the Tenth Circuit's holding. The Tenth Circuit took pains to point out that the *Aspen Skiing* "principles governing refusals to deal do not control here." Pet. App. 31a n.12. Rather than impose a duty to cooperate with a rival, the Tenth Circuit reversed summary judgment because it found there was sufficient evidence that the defendants created "deliberate" schedule conflicts as part of "pattern . . . capable of contributing significantly to a monopolization attempt." Pet. App. 30a, 32a. Petitioners cannot and do not argue that the Tenth Circuit's actual holding on those facts merits review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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November 13, 1995

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